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No. 648

IN THE

# Supreme Court of the United States

October Term, 1968

MARKHAM ADVERTISING COMPANY, INC.; CASEY & STONE COMPANY; COLUMBIA BASIN OUTDOOR ADVERTISING CO.; NORTHWEST OUTDOOR ADVERTISING CORPORATION; OBIE OUTDOOR ADVERTISING, INC.; SUNSET OUTDOOR ADVERTISING COMPANY; YAKIMA VALLEY POSTER SERVICE, INC.; GROVER ADVERTISING INC.; individually and as a class,
*Appellants,*
FOSTER AND KLEISER, Division of METROMEDIA, INC.,
*Plaintiff,*
v.
THE STATE OF WASHINGTON; WASHINGTON STATE HIGHWAY COMMISSION AND THE HONORABLE MEMBERS THEREOF, CONSISTING OF ERNEST A. COWELL, CHAIRMAN; ROBERT L. MIKALSON, GEORGE D. ZAHN, JAMES M. BLAIR, SR., AND IRVING CLARK, JR., their Officers, Agents and Employees,
*Appellees,*
IRA R. GRANT,
*Intervenor,*
M. C. BEATIE AND TRANQUILLA KOZAK,
*Additional Intervenors.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

## PETITION FOR REHEARING ON JUDGMENT OF DISMISSAL

ALFRED J. SCHWEPPE
THOMAS R. BEIERLE
*Attorneys for Appellants*

657 Colman Bldg.
Seattle, Washington 98104

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*Appellees,*

IRA R. GRANT,
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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

## PETITION FOR REHEARING ON JUDGMENT OF DISMISSAL

## PETITION FOR REHEARING

The appellants respectfully petition for a rehearing of this court's order, entered January 13, 1969, dismissing the appeal herein for want of a substantial federal question.

The jurisdictional statement was filed and the case docketed on October 14, 1968.

No motion to dismiss for want of jurisdiction was filed by appellee under Rule 16 within thirty (30) days or any other time. While this fact is, of course, not determinative, it does indicate that appellees considered the federal questions substantial.

The judgment made herein on January 13, 1969, reads:

> "Dismissed for want of a substantial federal question."

There was no citation of authority. The court did not follow its standard practice of citing its previous decisions which are believed to be so conclusive as to render the questions unsubstantial.

This leaves the grounds of the decision open to conjecture only.

We are fully familiar with the test of substantiality as set forth in *Ex parte Poresky*, 290 U.S. 30, 32, and many other cases:

> "The question may be plainly unsubstantial because it is 'obviously without merit,' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'"

Or, stated conversely, the federal question is "substantial" if:

> "We are unable to say that every question that appellants have brought here for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance." *Hamilton v. Regents*, 293 U.S. 245, 258.

Or, otherwise stated:

> "The question is not so clearly lacking in merit that upon mere citation of our decisions it may be put aside as not requiring further consideration."
>
> *Alton R. Co. v. Illinois Commission*, 305 U.S. 548, 550;
>
> *Cheseboro v. Los Angeles County Dist.*, 306 U.S. 459, 463.

With the foregoing tests of substantiality in mind, let us examine the instant case.

The case involves a new statute, Washington State's Highway Advertising Control Act of 1961. Neither this act nor any one like it has ever been before this court before.

The questions believed to be substantial are:

**1. Supremacy of the Federal Statute**

The supremacy of the 1965 Federal Highway Beautification Act, Public Law 89-285, approved October 22, 1965, 79 Stat. 1028, over the Washington State act is a novel question before this court. The question has been ruled on by the Supreme Court of Georgia (*State Highway Department v. Branch*, 222 Ga. 770, 152 S.E.2d 372 (1966)), and by the Supreme Court of the State of Washington in the present case. They have reached exact-

ly opposite conclusions, the Washington court having refused to agree with the Georgia court.

When there is a division of opinion between the highest courts of two states as to the interpretation or application of a recent federal statute not yet construed by a federal court, it would seem to follow inevitably the federal question is substantial.

State police power measures are subject to the Supremacy Clause. When a state statute "collides with the federal Constitution or an act of Congress . . . the action of a state must give way by virtue of the Supremacy Clause. Article VI, Clause 2. There is such a collision here." *Morris v. Jones,* 329 U.S. 545, 553 (opinion by Mr. Justice Douglas).

The error of the Washington court is demonstrable from the language of the federal act ("just compensation shall be paid," "Nothing in this act . . . shall be construed to authorize private property to be taken . . . without just compensation") and the legislative history, both in House and Senate committee reports and legislative debate. *"The committees emphatically and unanimously reject the use of police power in acquiring these rights . . . such payment is mandatory, not permissive, on the states."* Senate Report No. 709, 89th Congress, first session, p. 7; House Report No. 1084, 89th Congress, first session, p. 7; Senate Report No. 542, 90th Congress, first session, p. 10; House Report No. 713, 90th Congress, first session, p. 5.

The impact of the 1965 Federal Act, if held to be supreme, would be substantial, as it would, among other things:

(a) Reject as invalid non-compensatory police power removal under the state act, and provide for just compensation, on sign removal;

(b) Provide a later removal time (1970) than the state act (immediate) on those signs lawfully in existence on September 1, 1965, as most of appellants' signs here were;

(c) Permit signs in commercial and industrial areas without regard to distance limitations.

In passing on this question the Washington court explicitly recognized, even quoted, the mandatory language in the 1965 act requiring just compensation to be paid, *Markam Adv. Co. v. State*, 73 W.D.2d 413 at 421. This mandatory language, found in the 1965 Federal Act, §131-(g) reads,

> "(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices—
>
> "(1) those lawfully in existence on the date of enactment of this subsection,
>
> "(2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and
>
> "(3) those lawfully erected on or after January 1, 1968."

The federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

> "(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and
>
> "(B) The taking from the owner of the real property on which the sign, display, or device is located,

of the right to erect and maintain such signs, displays, and devices thereon."

The mandate appears again in §401:

"SEC. 401. Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act."

In the face of the mandatory language, the Washington court strangely held "that the purpose of the federal statute is obviously to induce the states to act, not to require them to do so," and that the federal act was simply "directory" and not mandatory. 73 W.D.2d at 427.

Oddly, the state court, after quoting *the mandatory* provisions of the federal statute completely bypassed them, and, referring to other permissive features of the federal act, held that the *whole* federal act was directory. In so doing the state court disregarded the clear text of the statute itself, and ignored the Senate and House reports unqualifiedly expressing that mandatory intent.

A reading of the 1965 Federal Act will show that the holding of the Washington court is patently erroneous, and should be summarily reversed on this issue alone. We note that a ruling in favor of the appellants on this issue would be dispositive of all the other issues in the case, as it would render the state act wholly unenforceable and unworkable.

**2. Denial of Due Process—Retroactive Taking of Property in a Legitimate Business Without Compensation**

Moreover, as pointed out in the jurisdictional statement, even if the state can compel the removal of bill-

boards existing at the time of the passage of the state act and at all times since, even a state police power statute cannot operate retroactively to require removal of a structure which is not a nuisance in fact without requiring just compensation to the owner.

Well decided state cases hold that even though a legislature under its police power may require removal of certain structures, a police power statute cannot operate retroactively to require removal of a structure which is not a nuisance in fact and deny the owner just compensation. The attempt to do so is wholly confiscatory in violation of due process of law.

> *General Outdoor Advertising Co. v. Indianapolis*, 172 N.E. 309, 314 (Ind. 1930);
>
> *Stoner McCray System v. Des Moines*, 78 N.W. 2d 843, 850 (Iowa, 1956);
>
> *State Highway Dept. v. Branch*, 152 S.E.2d 372, 373-4 (Ga. 1966);
>
> *Vermont Salvage Corp. v. St. Johnsbury*, 133 Vt. 341, 34 A.2d 188, 196 (1943).

In *General Outdoor Advertising Company v. Indianapolis*, 172 N.E. 309, 314, the Supreme Court of Indiana said:

> "The legislature may enact regulations applicable to structures and uses which existed before the enactment, but, where such structures and uses are not nuisances *per se*, their removal and destruction cannot be ordered without just compensation."

This Indiana decision, opposed to the holding of the Washington State Supreme Court in the instant case, is set forth as a leading case in Stason, *Cases on Municipal Corporations*, Ch. 3, Sec. 2, pp. 229, 234 (American Case-

book Series). This Indiana case is cited with approval in the recent Iowa case above noted, and the same result is reached in Vermont and Georgia cases cited above.

This is the proper view under the Fourteenth Amendment, according to these state cases.

This great due process question is open in this court.

Indeed, this final issue—whether due process is violated by the application of police power to effect an extinguishment without compensation of legitimate business, not shown to be nuisances in fact or *per se*, conducted on private property—is one which this court should by all means accept as a substantial federal question, for the holding of the Washington State Supreme Court is squarely contradictory to the limitation imposed on police power under these circumstances in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L.Ed. 322, 43 S. Ct. 158. In that case, this court held a statute restricting coal company's rights to mine so as to cause subsidence of property to be a taking, rather than a constitutional exercise of police power. The court, through Mr. Justice Holmes, stated in language applicable to the instant case:

> "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth

Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"*The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.*" (Italics supplied)

The principle of the foregoing case not only supports the substantiality of this due process question, but if applied to the instant case, appears to require a reversal of the judgment below.

At any rate, when the state courts are sharply divided on the question whether lawfully-built pre-existing structures may be destroyed under the police power without compensation, it would appear that the question is, by any test, substantial.

**3. Violation of First Amendment Rights**

The degree of free speech protection to be accorded commercial advertising is open in this court and has "never been authoritatively determined." Mr. Justice Douglas in *Cammarano v. U.S.*, 358 U.S. 498, 513 footnote.

In *Valentine v. Chrestensen*, 316 U.S. 52, 86 L.Ed. 1262, 62 S. Ct. 920 (1940), a case involving the distribution of hand bills on public streets, Mr. Justice Roberts, writing for the court recognized the appropriate general rule.

"This court has unequivocally held that the streets

> are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. . . ."

but followed it with the statement:

> ". . . We are equally clear that the constitution imposes no such restraint on government as respects purely commercial advertising . . ." (316 U.S. at 54.)

This statement, as noted by Mr. Justice Douglas' concurring opinion in *Cammarano v. United States*, 358 U.S. 498 at 514, 3 L.Ed.2d 462, 79 S. Ct. 524 (1959), "has not survived reflection." Justice Douglas further observed:

> "The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive."

Not only is the broad statement in *Valentine* not applicable because the case deals with distribution of handbills on city streets, rather than a display on private property, but as Justice Douglas noted in *Cammarano* with respect to commercial advertising:

> "The extent to which such advertising could be regulated consistently with the First Amendment . . . has therefore never been authoritatively determined." 358 U.S. at 513, footnote.

This observation is borne out by the application of first amendment protection to other forms of enterprise. See *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444, 80 L.Ed. 660 (1936), holding a tax on advertising

revenues to be violative of the First Amendment, *Thornhill v. Alabama*, 310 U.S. 88, 84 L.Ed. 1093, 60 S. Ct. 736 (1940), holding that picketing to redress labor grievances was protected by the First Amendment, as well as recent obscenity cases such as *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L.Ed.2d 584 (1962), and *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L.Ed.2d 649 (1964).

Billboard advertising as a means of exercising free speech must be viewed in the context of the stipulation heretofore referred to and quoted to the effect that:

> "Such advertising structures are used for advertising of primarily national; but some local, products by primarily national, but some local, advertisers. Said structures are also used for the purpose of conveying public messages by persons in public and private life, by churches and others. Said advertising structures are used as channels of communication, mostly commercial in nature, which reach many thousands of people every day. Also, the outdoor advertising company plaintiffs act as distributors for advertisements, political thought and messages, religious thought and messages, community thought and messages, and pleas of charitable organizations, and offer their facilities to the public for distribution of communications of all types." (Joint Stipulation, Ex. 37.)

Nor is there in the instant case any clear and present danger of destruction of life or property, invasion of the right of privacy, or breach of the peace, or indeed of *any* serious substantive evil which would justify the legislation. *Edwards v. South Carolina*, 372 U.S. 229, 9 L.Ed.2d 697, 83 S. Ct. 680 (1963). There is here no finding that any outdoor advertising structure is a nuisance, in fact or *per se*. At best there is only "implicit" finding, demonstrably false, that there is a relationship between highway

traffic safety and the presence of outdoor advertising structures.

The state conceded that it knew of no instance in which an accident had ever been attributed to the presence of a billboard, and offered no proof of any.

Because this state act, and the rules and regulations promulgated under it, permit some signs and prohibit others, require local advertisers to use one size print and national advertisers another, etc., there is also a substantial question as to whether the state act, as implemented, violates the equal protection clause of the Fourteenth Amendment, which forbids classification of free speech even where there may appear to be a rational basis for doing so. See *Board of Education v. Barnette,* 319 U.S. 624 at 639, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943), and *Adams v. Hinkle,* 51 Wn.2d 763 at 784 *et seq.*, 322 P.2d 844 (1958).

The Washington court nevertheless affirmed the trial court's holding that the First Amendment was not violated by holding that the act was "a reasonable regulation" relying on the quotation from Mr. Justice Roberts quoted above which has already been characterized by Mr. Justice Douglas as not having "survived reflection." That is not sufficient to justify an infringement of freedom of speech, especially discrimination in its exercise.

The permits which must be obtained before a message may be displayed, and the reporting of changes in the advertising copy prior to making the change, and which permits are revocable by appellees for failure of the sign to conform to the regulations (and may also subject the permittee to criminal prosecution) are also a form of

unconstitutional prior restraint. *Lovell v. City of Griffin*, 303 U.S. 444, 58 S. Ct. 666, 82 L.Ed. 949 (1938).

All of these first amendment questions, not presently determined in the context of commercial off-highway advertising are so substantial as to warrant full briefing and consideration by this court.

**4. Denial of Equal Protection**

A part of the equal protection argument is implicit in the discussion of the free speech issue; it alone is sufficiently substantial to warrant the court's acceptance of jurisdiction.

In addition, the act and the rules and regulations promulgated thereunder are replete with instances of wholly arbitrary discrimination, which the Washington court dismissed without discussion.

> "We can conceive of a state of facts which justifies every classification here attacked, and this requires us to uphold the Act and the Regulations." 73 W.D.2d at 436.

But, there is no reasonable basis for the distinction made as to those signs which fall in the prohibited classes, and those which do not; the "classification" itself is so inconsistent and discriminatory that it is impossible to discern a class at all.

As examples:

(1) The act would permit an "on-premise" sign, while outlawing the same sign on an adjacent piece of property.

(2) The act singles out the business of outdoor advertising by partially prohibiting it in commercial and in-

dustrial areas where all other legitimate businesses may operate.

(3) Requires national advertisers to conform to limitations on letter size, while such limitations do not apply to local advertisers.

(4) Permits off-premises signs advertising local businesses, whereas a sign in the same location which advertised a national business would be prohibited.

(5) Non-located activities, such as political and charitable messages, are prohibited because they have no "location."

Further examples are legion; these suffice to show the range of discrimination in effect. Discrimination of this sort cannot be justified by different business characteristics when it has no reasonable relation to those differences, nor to the purposes of the statute. *Morey v. Doud*, 354 U.S. 457, 77 S. Ct. 1344, 1 L.Ed.2d 485 (1957).

The test set out in *Walters v. St. Louis*, 347 U.S. 231 at 237, 98 L.Ed. 660, 74 S. Ct. 505 (1954), is not satisfied:

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

**5. Denial of Due Process of Law—Invalid Exercise of Police Power**

The due process issue is raised as the concomitant of the state act's being an invalid exercise of the police power. The argument directed to the inappropriateness

of this means of "regulating" the outdoor advertising business is separate from that raised in the federal supremacy argument, *supra,* as here the invocation of the police power is challenged on the grounds that it far exceeds the historical bounds of that doctrine.

Appellants' arguments proceed from the unchallenged premise that outdoor advertising is a "legitimate business," "an integral part of the business and marketing function and an established segment of the national economy." Senate Report 709, 89th Congress, first session, p. 6, on S. 2084, later the federal Highway Beautification Act of 1965. As such, it is not a nuisance *per se*. Nor is there any finding in this case that any sign is a nuisance in fact, which would provide a basis for the exercise of police power.

Appellants' business and structures affected are existing uses of private property. Removal of those structures destroys the value of the structures, impairs the value of the business and destroys the income-producing value of much of the land on which the signs are located. This business is conducted on private, not public, property.

The only support the Washington court found for this exercise of police power was the "implicit" finding of the trial court that there was a substantial relationship between traffic safety and the presence of highway outdoor advertising. A review of the trial court's Findings of Fact and Conclusions of Law clearly shows that the trial court never made a finding of a substantial relationship between traffic safety and outdoor advertising. Its finding (No. VII) merely says that there is "sufficient evidence to show that reasonable men could find that a relationship does

exist . . ."; *but there is no finding that it does exist; or that it is substantial* (Emphasis ours.) Rather, as noted in the court's Conclusions of Law (Nos. II and III), the court concluded: "There appears to be considered opinion both *pro* and *con*," and that "reasonable minds may differ as to whether the facts as found herein justify the exercise of the police power." Surely this does not accord with the requirement of a substantial relation to the object of the legislation, as set out in *Mugler v. Kansas*, 123 U.S. 623 at 661, 8 S. Ct. 273, 31 L.Ed. 205 (1887), and the line of cases since.

Nor is the police power properly invoked when it does not affect alike all persons similarly situated. *Mountain Timber Co. v. Washington*, 243 U.S. 219 at 237, 239, 37 S. Ct. 260, 61 L.Ed. 685 (1917).

If the state act is not a valid exercise of the police power, removal without compensation is thus patently a violation of due process, surely a matter of sufficient substance to warrant this court's exercise of jurisdiction in this cause.

## CONCLUSION

We respectfully urge that the order of dismissal be vacated, and probable jurisdiction noted, or at least that the question of jurisdiction be passed to the merits.

Respectfully submitted,

ALFRED J. SCHWEPPE
*Counsel of Record*

THOMAS R. BEIERLE
*Attorneys for Appellants*

February 4, 1969
657 Colman Building
Seattle, Washington 98104

## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

ALFRED J. SCHWEPPE
*Counsel of Record*